Filed 7/7/15 P. v. Feldman CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERIC LEE FELDMANN, Defendant and Appellant.	F068873 (Super. Ct. No. 12CM7665) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kings County. Michael J. Reinhart, Judge.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P.J., Franson, J. and Peña, J.

INTRODUCTION

On December 10, 2012, defendant Eric Lee Feldmann was charged with felon in possession of a firearm (count 1; Pen. Code, § 29800, subd. (a)(1)),[1] carrying a concealed firearm (count 2; § 25400, subd. (a)(2)), carrying a loaded unregistered handgun (count 3; § 25850, subd. (a)), and bringing a controlled substance into a jail (count 4; § 4573). It was also alleged that defendant had suffered a prior prison term within the meaning of section 667.5, subdivision (b).

Prior to his preliminary hearing, defendant filed a motion to suppress all the evidence against him on the grounds the seizure resulted from an unlawful detention. Following a hearing on the matter, the court denied defendant's motion to suppress. Defendant then entered a plea of no contest to counts 3 and 4 pursuant to section 859a. As part of defendant's plea agreement, the remaining counts and the special allegation were dismissed, and defendant was placed on three years of probation.

On appeal, defendant argues the court improperly denied his motion to suppress or, in the alternative, that his trial counsel was ineffective for failing to preserve his Fourth Amendment claim for appellate review. We affirm the judgment.

FACTS

On December 8, 2012, at approximately 12:30 a.m., Officer Sergio Moran observed defendant and another man walking down the street he was patrolling.

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[1] All statutory references are to the Penal Code.

Recognizing both men from previous encounters, Moran pulled his patrol car alongside them to ask where they were going.

While Moran talked with the two men, he observed defendant nervously digging inside his pockets. Believing defendant was attempting to discard something, Moran stepped out of his patrol car and asked defendant to remove his hands from his pockets. Moran shined his flashlight across defendant's eyes and noticed they were dilated. He asked defendant about any recent drug use, and defendant admitted to using methamphetamine within the last week. At that point, Moran attempted to do a patdown search of defendant, but defendant resisted. Moran then handcuffed defendant, who was later determined to be in possession of both a loaded firearm and a bag of marijuana.

Prior to his preliminary hearing, defendant filed a motion to suppress the evidence against him, arguing the initial stop by Officer Moran was unjustified. Following a hearing, the court denied defendant's motion, finding the initial contact between Moran and defendant to be a consensual encounter.

DISCUSSION

I. Defendant's Fourth Amendment argument is waived.

First, defendant contends his motion to suppress was improperly denied. This argument is waived.

In order to obtain appellate review of a search and seizure issue, a defendant must raise the issue in the superior court. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896-897.) Raising the issue before a magistrate is not sufficient to secure appellate review, even if the magistrate also serves as a superior court judge. (*People v. Hart* (1999)

74 Cal.App.4th 479, 485-486 (*Hart*); *People v. Richardson* (2007) 156 Cal.App.4th 574, 594 (*Richardson*).)

Here, while defendant raised his Fourth Amendment claim before the magistrate, he failed to raise the issue in the superior court. Thus, defendant waived the argument. Defendant attempts to circumvent this fact by noting that the superior court judge was the same judge who ruled on the suppression motion as a magistrate. This argument, however, was explicitly rejected in *Richardson, supra,* 156 Cal.App.4th 574, where the Third District held the following:

> "Furthermore, it does not matter for purposes of applying the *Lilienthal* rule that the superior court judge whose judgment we would be reversing here was the same judge who ruled on the suppression motion. Under section 859c, defendant had the right to have another superior court judge, acting as a superior court judge, review [the judge's] ruling as a magistrate, but he declined to exercise that right when he pled guilty under section 859a. Having failed to avail himself of that right, he cannot now rely on the fact that the magistrate and the superior court judge in this case were the same person to justify deviating from the *Lilienthal* rule." (*Richardson, supra,* 156 Cal.App.4th at p. 594.)

Therefore, the denial of defendant's motion to suppress is not subject to appellate review.

II. Defendant was not denied the effective assistance of counsel.

Next, defendant argues that, if we conclude he waived his Fourth Amendment claim, his trial counsel was ineffective for failing to preserve the issue. We disagree.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that "(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings."

(*People v. Duncan* (1991) 53 Cal.3d 955, 966.) When, as in this case, a claim of ineffective assistance involves the failure to renew a motion to suppress, these showings are made if the defendant can establish the challenge was valid and "there would not have been sufficient evidence, otherwise, to convict." (*Hart, supra,* 74 Cal.App.4th at p. 487.)

Here, however, we do not conclude defendant's Fourth Amendment claim was valid. As there was clear reason to detain defendant after he exhibited physical symptoms of drug intoxication and admitted to recent drug use, defendant's challenge must be limited to the brief period of time between when Officer Moran pulled up alongside defendant and when he shined his flashlight across defendant's pupils. We find that period of time constituted a consensual encounter.

Consensual encounters do not trigger Fourth Amendment scrutiny and, unlike detentions, require no articulable suspicion that the person has committed or is about to commit a crime. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821.) "[A] detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur." (*Ibid*.) "Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled." (*Ibid*.)

In this case, Officer Moran pulled up alongside defendant and asked conversational questions. He did not block defendant's path, engage his emergency lights, or order defendant to stop. In fact, Moran did not even exit his patrol car until after observing defendant digging in his pockets. While defendant may have felt he was under official scrutiny when Moran's patrol car pulled alongside him, "such directed scrutiny does not amount to a detention." (*People v. Franklin* (1987) 192 Cal.App.3d 935, 940.)

Defendant, however, cites specific acts which he alleges rendered the contact non-consensual. First, he notes that Moran told defendant to remove his hands from his pockets. Asking a subject to remove their hands from their pockets, however, does not transform an encounter into a detention. (*People v. Franklin, supra*, 192 Cal.App.3d at pp. 941-942.) Next, defendant cites *People v. Jones* (1991) 228 Cal.App.3d 519, 523 for the proposition that "[a] reasonable man does not believe he is free to leave when directed to stop by a police officer who has arrived suddenly and parked his car in such a way as to obstruct traffic." In this case, Moran testified he maneuvered his patrol vehicle across the oncoming lane in order to pull alongside defendant; there was no evidence that the officer arrived suddenly and parked his vehicle diagonally against traffic, as was the case in *Jones*. (*Ibid*.)

Given the totality of the circumstances, we conclude that the initial interaction between Moran and defendant was consensual. Accordingly, defendant's Fourth Amendment claim is invalid and, as a result, his claim of ineffective assistance of counsel must fail.

DISPOSITION

The judgment is affirmed.